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No. 823

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MEMORANDUM OF WESTERN NATURAL GAS COMPANY AS AMICUS CURIAE IN REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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On May 28, 1962, this Honorable Court entered an order in the above entitled cause granting the motion of Western Natural Gas Company for leave to file brief, as *amicus curiae*. On the same day, this Honorable Court requested the Solicitor General of the United States to file a memorandum on the question of

whether there is a conflict with the Natural Gas Act. In response thereto, the Solicitor General of the United States filed a memorandum for the Federal Power Commission as *amicus curiae* referring specifically to the brief *amicus* of Western. This memorandum is filed in response to the memorandum of the Solicitor General.

The Solicitor General would adhere to the principles of the filed rate doctrine as established in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, yet would suspend its application in this particular case.

Thus he agrees the lower court's doctrine, if applied otherwise than to the particular facts here, would conflict with the Act and impair the Commission's role in its administration.

The Solicitor General would permit application of the decision below only to the particular facts of this case, but we know of no way, and he suggests none, whereby the precedent thereby established may be so controlled.

The line of distinction the Solicitor General would draw between the cases wherein the doctrine of the lower court would violate *Montana-Dakota* and impair the Commission's role and those wherein it would not is indeed difficult to perceive. For example, he would hold *Montana-Dakota* not violated in the present case wherein a party to a contract underlying a rate schedule seeks to litigate in another forum the effect of acceptance for filing as part thereof a law by which, at the time, the contract was apparently modified, yet would hold *Montana-Dakota* violated where a party to

a contract so filed seeks to litigate *construction of the contract.* In either case we have merely a rate accepted for filing (as distinct from approved) and in either case the answer may determine the effective price at which the gas is to be sold or purchased. If application of the lower court's doctrine in the one case would violate the Act and impair the Commission's role in its administration, we cannot see how it would fail to have a similar effect in the other. And the facts in Western's case readily demonstrate that the decision below conflicts with the Act and impairs the Commission's role even if limited to the cases involving minimum price filings.

As pointed out in Western's *amicus* filing, (a) a complaint proceeding instituted by it before the Federal Power Commission early in 1958 seeking a declaratory order determining effect of such a filing remains undisposed of by the Commission, (b) following the filing of such complaint Western's purchaser brought suit against it in a Delaware court necessarily involving determination of the same question, (c) there remains undisposed of a suit brought against Western and its purchaser in Kansas by royalty owners seeking declaratory order determining such question and (d) during pendency of all such proceedings there was instituted and concluded by the Federal Power Commission an investigation of all of Western's rates under Section 5(a) of the Natural Gas Act.

Such Section 5(a) proceeding was brought by the Commission in carrying out its administration of the act. Of necessity such investigation involved consideration of the reasonableness of Western's revenues based upon its effective rates and in such proceeding the Commission's staff gave full recognition for such

purposes to the 11¢ rate as filed. The case was concluded by the Commission without disturbing such rate. How can it be said that the existence of authority in the courts to determine years later in collateral proceedings that Western's rate was other than as shown in the filings so used does not impair or affect the Commission's role in conducting such a Section 5(a) proceeding? And as the proceeding was conducted and concluded on the basis of a lawfully effective rate of 11¢, what is the effect on the rate so used and the disposition of the case made by the Commission if a court years later in collateral proceedings holds the Commission erred in using the rate as filed?

In Docket No. RI60-213 involving Western's application, in 1960, to place in effect an increased rate for its Hugoton Field gas, there became, and is, involved the question of whether the rate in effect prior to the rate increase filing was 11¢ or 8¢, since such determination measures the maximum refund liability in event the increased rate is determined to be excessive. In this matter the Commission has expressly declined to declare what was the effective rate at the time of the rate increase filing, stating the matter was subject to litigation in the courts. In assessing any refund liability may the Commission determine the rate level or must it await court determination thereof? If it makes such determination on basis of rates as filed and a court later, without review of Commission action, determines the rate other than as so used, is the refund liability changed? Can this Commission reopen the matter? Where the Commission has taken an action based on such a filing should a court be permitted to declare it wrong without appeal from the Commission's action?

The Solicitor General declares the lower court has not decided "any question of a kind which necessitates agency determination." Yet the lower court determined what the rate was, and we had heretofore understood that the primary purpose for the Commission's existence was to determine rates. Its administration of the Act required it to, and it did, consider and apply the filed rate in Western's 5(a) proceeding, and in the rate increase matter it was its duty to do so.

It is true that the Commission has (a) refused, for over five years, to set down for hearing or otherwise dispose of Western's complaint in Docket G-14958 involving Commission jurisdiction to determine the rate established by the disputed filing, (b) dismissed in 1962 without decision its R-168 proceeding instituted by it in 1958 for the specific purpose of determining the effect of such filings (see Brief of Respondent in Opposition p. 12) and (c) declined to say what rate was so established even in rate increase proceedings where the determination was required to assess refund liability. Yet its authority and duty in these areas remains and, we trust, will be here reaffirmed.

The Solicitor General says the courts are now "equally empowered" (with the Commission). Just what impairment of Commission jurisdiction does this imply? Is the Delaware court equally empowered with the Commission to decide Western's rate despite the pendency with the Commission since prior to start of the Delaware suit of a complaint proceeding seeking Commission determination of that question? Or should a proper order of proceedings require (as in *California, Petitioner* v. *Federal Power Commission* decided here April 30, 1962) disposal of the Commission proceeding before the court acts?

And if the Delaware court determines the rate on the lower court's doctrine is the Commission required to abide thereby (a) in the complaint proceeding or (b) in the rate increase proceeding in Docket RI60-213?

What effect on the Commission's determination of Western's rates would be given a determination thereof in the Kansas declaratory judgment action?

What problems of "unscrambling" are imposed on the Commission by a court decree in these cases retroactively changing the rate accepted for filing? True, where pipeline rate increase orders have so provided, there will be refunds (to the distributors) of the jurisdictional portion of any recoveries. But what of the non-refundable interest earnings of the pipelines on amounts collected from jurisdictional customers since 1958 when the pipelines ceased paying producers the 11¢ rate? And what of the amounts collected by such pipelines from non-jurisdictional customers due to increases based on the 11¢ cost? Can the Commission devise and administer a plan that will effectively and equitably unscramble the results so that the burden falls equitably on the parties involved? As the Act did not contemplate such reparations, should the Commission be burdened with handling them?

All this costly litigation and confusion would have been avoided by simple adherence to the rule in *Montana-Dakota* that a rate as filed remains the rate until changed in the manner provided by the Natural Gas Act.

We respectfully submit that this Honorable Court should grant the petitions for writ of certiorari herein and by its decision unequivocally reaffirm the filed rate doctrine under the Natural Gas Act and restore the

Federal Power Commission to its rightful jurisdiction over natural gas rates.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served the foregoing Memorandum of Western Natural Gas Company as Amicus Curiae in Reply to Memorandum for the Federal Power Commission as Amicus Curiae upon the following named parties of record in this proceeding, by delivering a copy thereof in person, or by mailing a copy thereof properly addressed, to each of the parties named, or, where indicated, to the attorney of record of a party named:

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Dated at Washington, D. C., this 12th day of June, 1962.

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